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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 AMOS CENDALI JR.,

12 Plaintiff,

13 vs.

14 TREX ENTERPRISES CORP,

15 Defendant.
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CASE NO. 07CV2323-LAB (NLS)

**ORDER DENYING MOTION FOR
LEAVE TO FILE SECOND
AMENDED COMPLAINT**

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18 Plaintiff, who is proceeding *pro se*, filed his Complaint on December 12, 2007. On
19 December 14, 2007, the Court granted his motion to proceed *in forma pauperis*, screened
20 his Complaint, and dismissed it. On February 20, 2008, Plaintiff filed his First Amended
21 Complaint ("FAC"). On February 29, 2008, the Court issued an order dismissing the FAC
22 and requiring Plaintiff, if he wished to file a second amended complaint, to seek leave to do
23 so within 30 days. On March 27, 2008, Plaintiff submitted his proposed second amended
24 complaint ("SAC") accompanied only by a caption page indicating the attached complaint
25 was his SAC. The Court construed as a motion for leave to file the attached SAC and
26 accepted by discrepancy order.

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1 The Court has reviewed Plaintiff's proposed SAC and now **DENIES** his motion for
2 leave to file it. In its order issued February 29, 2008, the Court dismissed all claims with
3 prejudice except claims brought under ERISA, which were dismissed without prejudice.

4 Plaintiff was previously cautioned twice about the "short and plain statement"
5 requirement of Fed. R. Civ. P. 8, yet again has not complied with it. He was also twice
6 directed to include factual allegations rather than merely attaching documents and quoting
7 statutes, and to include a statement of explaining why the Court has jurisdiction over this
8 matter, yet has failed to comply with this requirement as well. Although Plaintiff was
9 previously warned the Court was not free to act as his counsel by reading attached
10 documents and constructing allegations and arguments for him (see Order Dismissing
11 Complaint at 3:11–16 (citing *Licon v. Marshall*, WL 2121647, slip op. at *2 –*3 (S.D.Cal.,
12 July 23, 2007))), he again pursued this strategy. His attached grievance letters, however,
13 establish he is capable of submitting documents explaining his position. His proposed SAC
14 is somewhat more readable than his first two attempted complaints, but still would give the
15 Defendant no clear notice what his claims are.

16 At the Court's direction, Plaintiff attached to his FAC copies of state court rulings. On
17 this basis, the Court determined most of Plaintiff's claims had already been litigated and
18 could not be relitigated in this action. The only potential claims this Court might have
19 jurisdiction over would be any ERISA claims he might have had, although his FAC never
20 articulated any and only incidentally referred to ERISA and employee benefit plans. The
21 Court therefore dismissed all claims with prejudice except for any possible ERISA claims
22 Plaintiff might have, which were dismissed without prejudice.

23 The proposed SAC attempts to resurrect the claims the Court has already dismissed
24 with prejudice, and still fails to state an ERISA claim. The closest he comes is to include the
25 title page of a long-term disability policy issued by UNUM and to mention the name of this
26 plan. The documents he attaches suggest that he broke his toe in a worksite accident and
27 was experiencing pain, although he could still walk. (Proposed SAC at 7–9 (grievance letter
28 to employer).) His chief complaint at that time was that he wanted his employer send him

1 to the doctor and to provide him with a pair of steel-toed boots so he could continue working
2 safely. (*Id.*) He was seen by a doctor, who took X-rays and told him his toe would require
3 8 to 16 weeks to heal. (*Id.*) He was terminated the same day, before a decision was made
4 about providing steel-toed boots. (*Id.*) These documents make clear Plaintiff thinks he was
5 injured but not disabled. His chief grievance, as outlined in the supporting documents
6 (though not alleged) is that his employer fired him immediately after he was injured.

7 Discharging an employee for exercising his rights under a benefit plan, or interfering
8 with those rights is actionable under § 510 of ERISA, 29 U.S.C. § 1140. Because there is
9 no allegation Plaintiff was terminated for exercising his rights under his employer's medical
10 plan, or terminated in order to prevent him from exercising his rights under his employer's
11 short-term or long-term disability plan, Plaintiff has not stated a claim under this provision.
12 Nor has he stated a claim under any other provision of ERISA.

13 Although the proposed SAC is rejected for filing, it is not absolutely clear at this point
14 Plaintiff cannot state a claim under ERISA, which appears to be the only viable claim he may
15 have. Any claim under § 510 would, however, require Plaintiff to allege and prove he was
16 eligible for benefits under the plan. *Tolle v. Carroll Touch, Inc.*, 977 F.2d 1129, 1134 (7th
17 Cir. 1992). While the attached documents suggest Plaintiff was eligible for medical care
18 under his employer's medical plan, there is no suggestion he was disabled as defined by his
19 employer's short-term or long-term disability plan. (SAC at 12 (termination letter, giving
20 COBRA notice and informing Plaintiff regarding upcoming termination of participant status
21 in his employer's medical, long-term disability, and short-term disability plans).)

22 Because it is not absolutely clear Plaintiff cannot state a claim under ERISA, he will
23 be given one last opportunity to amend his complaint. See *Weilburg v. Shapiro*, 488 F.3d
24 1202, 1205 (9th Cir. 2007) ("Dismissal of a *pro se* complaint without leave to amend is
25 proper only if it is absolutely clear that the deficiencies of the complaint could not be cured
26 by amendment.") (quoting *Schucker v. Rockwood*, 846 F.2d 1202, 1203–04 (9th Cir. 1988)).
27 If Plaintiff wishes to amend his complaint further, however, he **must** observe **all** of the
28 following requirements:

1 1. Plaintiff must file a motion for leave to file a second amended complaint
2 no later than **30 calendar days from the date this order is issued**. He
3 must attach his new proposed second amended complaint to this motion.
4 This motion may be filed *ex parte*.

5 2. The proposed second amended complaint must be complete in itself,
6 without reference to any previously filed complaints. See Civil Local Rule
7 15.1. In other words, Plaintiff should prepare his proposed second amended
8 complaint as if it were the first and only complaint filed.

9 3. The proposed second amended complaint must meet **all** requirements
10 set forth in Fed. R. Civ. P. 8(a) and (d), and 10. When preparing his
11 proposed second amended complaint, Plaintiff must comply with all
12 directions and admonitions included in the Court's previous orders regarding
13 the content and form of his complaint. Among these requirements is the
14 requirement that Plaintiff make factual allegations showing he is entitled to
15 relief. Plaintiff is specifically advised that including, quoting, or attaching
16 documents is not a substitute for making allegations.

17 4. The proposed second amended complaint must not include any claims
18 that have been dismissed with prejudice.

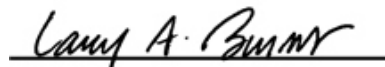
19 5. Any documents Plaintiff wishes the Court to consider must be attached
20 as exhibits to the proposed second amended complaint, and not included in
21 the body of the complaint. In the body of the proposed second amended
22 complaint, Plaintiff must explain the significance to his claim of any exhibits
23 he attaches.

24 Plaintiff is advised that if he fails to comply with these requirements, or any other
25 requirements under the Federal Rules of Civil Procedure, the Civil Local Rules, or the Court's
26 standing order, any proposed second amended complaint he submits may be rejected for
27 filing and his complaint dismissed without leave to amend.

28 **If Plaintiff fails to amend his complaint successfully within the time permitted,
or if he fails to comply with any of the conditions set forth above, this action shall be
dismissed without leave to amend, without further notice to Plaintiff.**

IT IS SO ORDERED.

DATED: April 4, 2008



HONORABLE LARRY ALAN BURNS
United States District Judge